United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE

UNITED STATES

COURT OF APPEALS

DISTRICT OF COLUMBIA CIRCUIT

APRIL TERM, 1951.

United States Court of Appeals
For the
District of Columbia Circuit

FILED JUN 5 1951

Joseph W. Stewart
CLERK

No. 10,851

JAMES J. LAUGHLIN,

Appellant,

versus

W. E. REYNOLDS, et al.,

Appellee.

428

Appeal from the United States District Court for the District of Columbia.

BRIEF FOR APPELLANT.

JAMES J. LAUGHLIN,
National Press Building,
Washington, D. C.,
Appellant.

QUESTIONS PRESENTED.

1. Has the lower court committed reversible error in giving precedence to the provisions of the 1940 Edition of the D. C. Code, which places the District Court building under the surveillance of the Attorney General, rather than the provisions of the 1946 Edition of the U. S. Code, Section 1, Title 40, which charges the control and supervision to the Public Buildings Administration?

2. Has the trial court committed reversible error in ruling that a citizen, who is denied access to and use of a considerable portion of a public building, cannot compel a government official, by mandamus, to perform a simple ministerial duty which the statute commands that official to perform?

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W. E. REYNOLDS, et al.,
Appellee.

Appeal from the United States District Court for the District of Columbia.

BRIEF ON BEHALF OF APPELLANT.

JURISDICTIONAL STATEMENT.

In this case, appellant's complaint for mandatory injunction was dismissed by the lower court. Notice of appeal was filed on November 2, 1950 and the record was filed in this Court on December 11, 1950.

This Court has jurisdiction to review the action of District Court in that it was a final order of that court.

STATUTES INVOLVED.

Section 1, Title 40, U. S. Code (1946 Ed.):

"The Public Buildings Administration in the Federal Works Agency shall have the absolute control of and the allotment of all space in the several public building owned or buildings leased by the United States in the District of Columbia, with the exception of the Executive Mansion and office of the President, Capitol Building, the Senate and House Office Buildings, the Capitol power plant, the buildings under the jurisdiction of the Regents of the Smithsonian Institution, and the Congressional Library Building, and shall from time to time assign and allot, for the use of the several activities of the Government, all such space."

Section 329, Title 11, D. C. Code (1940 Ed.):

"The District Court building in the city of Washington shall be under the supervision and control of the Attorney General."

Section 345, Title 40, U. S. Code (1946 Ed.):

"Temporary Rental of Land or Buildings Acquired; Spacing of Buildings; Exchange of Sites. In case a site or additions to a site acquired under the provisions of sections 341, 342, 343-345, 346, and 347 of this title contains a building or buildings, the Federal

Works Administrator is authorized, in his discretion, to rent until their removal becomes necessary such of said buildings as may be purchased by the Government, or the land on which the same may be located where the buildings are reserved by the vendors, at a fair rental value, the proceeds thereof to be deposited in the Treasury of the United States, and a report of the proceedings to be submitted to Congress annually."

Section 19, Title 40, U. S. Code (1946 Ed.):

"Supervision of Public Buildings and Grounds in the District of Columbia, Not Otherwise Provided For By Law: Eviction of Trespassers. The Federal Works Administrator, which has charge of the public buildings and grounds in the District of Columbia, under such regulations as may be prescribed by the President, except those buildings and grounds which are otherwise provided for by law; and when it shall be made to appear to said Federal Works Administrator or other officer under his direction having immediate charge of said public buildings and grounds that any person or persons is in unlawful occupation of any portion of said public lands in the District of Columbia, it shall be the duty of said officer in charge thereof to notify the Marshal of the District of Columbia in writing of such unlawful occupation and the said Marshal shall thereupon cause the said trespasser or trespassers to be ejected from said lands and shall restore possession of the same to the officer charged by law with the custody thereof."

Section 130, Title 40, Supp. to U. S. Code Annotated, 1951 Ed.:

> "The operation, maintenance, and repair of the completed building for the use of the United States Court of Appeals for the District of Columbia Circuit, and the United States District Court for the District of Columbia, shall be under the control of General Services Administration, and the allocation of space therein shall be vested in the Chief Judge of the United States Court of Appeals for the District of Columbia and the Chief Justice of the United States District Court for the District of Columbia."

Section 342, Title 40, Supp. to U. S. Code Annotated, 1951 Ed.:

> "All functions of the Federal Works Agency and of all agencies thereof, together with all functions of the Federal Works Administrator and all functions of the Commissioner of Public Buildings and the Public Buildings Administration were transferred to the Administrator of General Services by Sec. 103(a) of the Act of June 30, 1949, Ch. 288, Title 1, 63 Stat. 380."

STATEMENT OF THE CASE.

The District Court House is a public building, title of which is in the Government of the United States. The appellee, by statutory provisions of Section 1, Title 40, U. S. Code (1946 Ed.), is placed in charge of the Court House. Under the provisions of Section 19, Title 40, U. S. Code, 1946 Edition, he is empowered to eject trespassers from public buildings, the income therefrom to be paid into the Treasury of the United States.

The appellee has refused to exercise his authority and responsibility for the assignment of space in the District Court House, which has resulted in a condition wherein a wilful trespasser, namely, the Bar Association of the District of Columbia, is now openly and notoriously occupying considerable space in the Court House without payment of any rent. The appellee, although asked repeatedly to eject the trespasser as he is commanded to do by statute, has arbitrarily refused to do so and denies any responsibility in connection with the District Court House. Appellee states that Section 329, Title 11, D. C. Code, 1940 Edition, which places the control and supervision of the District Court House under the Attorney General, relieves him of any responsibility and that appellant therefore has no basis for asking him to eject the trespassers. Appellant is denied reasonable use of this space occupied by the trespasser, who claims rightful possession of said premises.

The trespassers are also actively obstructing the administration of justice in the District Court House in that they make their facilities available only to members, or non-members who have paid a fee. Although the trespassers are illegally occupying space within the Court House, they have dared to practice racial discrimination in the use of the facilities illegally held.

In the argument that follows appellant will pray the Court to compel appellee to perform the duty the statute requires of him, namely, to exercise his authority over the District Court House, and to eject wilful trespassers who are illegally upon the premises without paying rent of any kind, and who are practicing racial discrimination on the premises illegally held.

STATEMENT OF POINTS.

1. The lower court committed reversible error in giving precedence to the provisions of the 1940 Edition of the D. C. Code, which places the District Court building under the surveillance of the Attorney General, rather than the provisions of the 1946 Edition of the U. S. Code, Section 1, Title 40, which charges the control and supervision to the Public Buildings Administration.

2. The trial court committed reversible error in ruling that a citizen, who is denied access to and use of a considerable portion of a public building, can-

not compel a government official, by mandamus, to perform a simple ministerial duty which the statute commands that official to perform.

SUMMARY OF ARGUMENT.

1. The express provision of the 1946 Edition of the U. S. Code, which places the control of the District Court House under the supervision of the Public Buildings Administration, takes precedence and is controlling over the conflicting provision of the 1940 Edition of the D. C. Code, which places the Attorney General in charge.

2. Mandamus will lie to compel a public officer to perform a ministerial duty which he arbitrarily refuses to do and which the statute commands.

ARGUMENT.

1. The appellee is an official of the government, charged with the responsibility and control of the District Court building. Section 1, Title 40, U. S. Code (1946 Ed.) provides as follows:

> "Control and Allotment of Space in Public Buildings in District of Columbia. The Public Buildings Administration in the Federal Works Agency shall have the absolute control of and the allotment of all space in the several public buildings owned or build-

> ings leased by the United States in the District of Columbia, with the exception of the Executive Mansion and office of the President, Capitol Building, the Senate and House Office Buildings, the Capitol power plant, the buildings under the jurisdiction of the Regents of the Smithsonian Institution, and the Congressional Library Building, and shall from time to time assign and allot, for the use of the several activities of the Government, all such space."

The appellee seeks to avoid the responsibility imposed on him by this statute by claiming that the provision of the D. C. Code, Section 329, Title 11 (1940 Ed.) is controlling. This Code provision reads:

> "The District Court building in the city of Washington shall be under the supervision and control of the Attorney General."

By elementary laws of statutory construction, in a conflict between two statutes, the one later in time is controlling, as announced in *Matthews vs. Zane, 20 U. S. 164.* A statute takes effect from the time of its passage where no time is expressly fixed. It will be noted that in the instant case we have a provision of the 1946 U. S. Code in direct conflict with a provision of the 1940 Edition of the District Code. Since the statute in the U. S. Code is later in time it is controlling.

A simple reading of Section 1, Title 40, U. S. Code (1946 Ed.) shows that all public buildings were put under the control of the Federal Works Agency, and that Congress then made certain specific exceptions, such as the Executive Mansion, the Capital Building, the Senate

and House Office Buildings, etc. The District Court building is not listed as an exception. The intent of Congress is obvious; since the District Court building was not listed as an exception, it, like all other public buildings, would fall under the control and surveillance of the Public Buildings Administration. The doctrine of *"expressio unius est exclusio alterius"* is precisely applicable and places the Court House building under the control of the appellee. The lower court, if it did not choose to place appellee in control, should have, under the reasoning listed above, considered the later and conflicting provision of the U. S. Code as repealing the provision of the D. C. Code by implication. While appellant agrees that repeals by implication are not favored by the courts, this would have been an added ground for the trial court to find as a matter of fact that appellee has control over the District Court building and that appellant has a right to compel appellee to exercise that control.

The case of *U. S. vs. Wrighwood Dairy Co., 127 Fed. 907* states:

> "It will be enough to say that if a conflict exists, the later Federal law would prevail over the earlier * * *."

In Section 1, Title 40, U. S. Code (1940 Ed.), we have specific buildings exempted and enumerated as beyond the power and authority of the Public Buildings Administration, and by an elementary principle of statutory construction all buildings not specifically listed as exceptions are thereby included and are

within the power of the Public Buildings Administration.

In the case of *City of Tulsa, Oklahoma vs. Midland Railroad Co., 168 F(2d) 252* we find:

> "* * * and the enumeration of specific powers operates to exclude those not enumerated." Citing *City of Tulsa vs. Southwestern Bell Tel. Co., 75 F(2d) 343.*

Hence we have Congress specifically excepting certain buildings from appellee's care. Thus, to include or add the District Court building as another exception, thereby curtailing the power of the Public Buildings Administration, would violate the rule announced in the case of *Cox vs. Boston Consul Gas Co., 67 Fed. Sup. 742,* that a court should be slow to read an exception into a statute. Appellant would also point out to the Court in determining the intent of Congress and in aiding the statutory construction that appellant is urging here, that subsequent legislation may be considered by the Court to assist in the interpretation of prior legislation on the same subject. Citing *Great Northern Railroad Co. vs. U. S., 62 S. Ct. 529; 315 U. S. 262.*

Section 130, Title 40, 1951 Supplement to the U. S. Code, Annotated, reads as follows:

> "The operation, maintenance, and repair of the completed building for the use of the United States Court of Appeals for the District of Columbia Circuit, and the United States District Court for the District

> of Columbia, shall be under the control of General Services Administration, and the allocation of space therein shall be vested in the Chief Judge of the United States Court of Appeals for the District of Columbia and the Chief Justice of the United States District Court for the District of Columbia."

This recent statute recognizes the general authority of General Services Administration over the public buildings of the District of Columbia. This conclusively shows that the old Court House is under the jurisdiction of Public Buildings Administration, as defined in Section 1, Title 40, U. S. Code (1946 Ed.). Appellant urges this because by a recent statute, Section 342, Title 40, 1951 Supplement to the U. S. Code Annotated, the Public Buildings Administration has been abolished and authority and jurisdiction of public buidlings has been delegated to General Services Administration. This statute reads as follows:

> "All functions of the Federal Works Agency and of all agencies thereof, together with all functions of the Federal Works Administrator and all functions of the Commissioner of Public Buildings and the Public Buildings Administration were transferred to the Administrator of General Services by Sec. 103(a) of the Act of June 30, 1949, Ch. 288, Title 1, 63 Stat. 380."

Thus by this statute we have the obvious Congressional intent that under Section 1, Title 40, all public buildings, save those excepted, were put under the Public Buildings Administration.

2. By the terms of the statute cited above, the Federal Works Agency has been abolished and control has been delegated to General Services Administration. These acts are in *para materia* and should be read together, and the only logical reading is that all public bulidings except those set out in detail by Section 1, Title 40, U. S. Code, and by those set out in Section 342, Title 40, 1951 Supplement to U. S. Code Annotated are under the control of appellee. Where statutes are in *para materia* they must be construed as one system and governed by one policy and spirit. Citing *Layne Western Co. vs. Buchanan County, 85 F(2d) 343.*

From all discussed above, namely, the fact that the provisions of the 1946 U. S. Code are in conflict with the earlier provision of the D. C. Code, that it is later in time, and that an ordinary reading of Section 1, Title 40 puts appellee in charge of the District Court building—this Court is compelled to correct the erroneous finding of the lower court on this subject. To maintain any other theory would be contrary to the plain intent of Congress, as manifested in the original statute, Section 1, Title 40 (1946 Ed.), and by the recent statute, Section 340, Title 40, U. S. Code Annotated, 1951 Ed., which reinforces appellant's contention that the Federal Works Agency, now designated as General Services Administration, has charge of all public buildings except those specifically excepted. In the original statute, Section 1, Title 40, U. S. Code (1946 Ed.), the Executive Mansion, the Capital Building, etc. were excepted. In the latest

Congressional statute, the new Court House has been added as an exception to the authority of the Public Buildings Administration, or General Services Administration. The Supreme Court has announced in *Camenetti vs. U. S., 242 U. S. 470,* and *Dewey vs. U. S., 178 U. S. 512,* the principle that if the language is plain and the meaning clear, the duty of interpretation does not arise and the sole function of the courts is to enforce the statute according to its terms.

The intent of Congress is plain that except for certain specific buildings which Congress has seen fit to put under the control of other parties, the Public Buildings Administration, now called General Services Administration, has control of all public buildings and any provisions of the D. C. Code which are in conflict have no force and effect in law, and the trial court, in giving the provisions of the D. C. Code precedence, committed reversible error.

2. Once the authority of the appellee is established by Section 1, Title 40, U. S. Code, as to surveillance and control of the District Court House, it becomes the public duty of appellee to enforce Section 19, Title 40, U. S. Code. This statute reads as follows:

> "Supervision of Public Buildings and Grounds in the District of Columbia, Not Otherwise Provided For By Law: Eviction of Trespassers. The Federal Works Administrator, which has charge of the public buildings and grounds in the District of Columbia, under such regulations as may be prescribed by the

President, except those buildings and grounds which are otherwise provided for by law; and when it shall be made to appear to said Federal Works Administrator or other officer under his direction having immediate charge of said public buildings and grounds that any person or persons is in unlawful occupation of any portion of said public lands in the District of Columbia, it shall be the duty of said officer in charge thereof to notify the Marshal of the District of Columbia in writing of such unlawful occupation and the said Marshal shall thereupon cause the said trespasser or trespassers to be ejected from said lands and shall restore possession of the same to the officer charged by law with the custody thereof."

The appellant is a citizen, a member of the public, and a member of the bar in good standing. He is denied access and use of the space which this wilful trespasser is holding illegally. Appellee has disclaimed any responsibility for care or control of the Court House, and thus arbitrarily refuses to eject the trespasser, namely, the Bar Asociation of the District of Columbia. The appellee has not only failed to eject the trespasser, as provided for in Section 19, Title 40, U. S. Code (1946 Ed.), but he has failed to enforce Section 345, Title 40, U. S. Code (1946 Ed.), which provides for Government rent for space assigned to private parties. This section reads as follows:

"Temporary Rental of Land or Buildings Acquired; Spacing of Buildings; Exchange of Sites. In case a site or additions to a site acquired under the provisions of sections 341, 342, 343-345, 346 and 347 of

> this title contains a building or buildings, the Federal Works Administrator is authorized, in his discretion, to rent until their removal becomes necessary such of said buildings as may be purchased by the Government, or the land on which the same may be located where the buildings are reserved by the vendors, at a fair rental value, the proceeds thereof to be deposited in the Treasury of the United States, and a report of the proceedings to be submitted to Congress annually."

Appellant calls upon the Court by mandamus to compel appellee to perform a purely ministerial duty, namely, to exercise authority and responsibility over the District Court House, which he is commanded by statute to do. It is a familiar principle of law that a party who shows injury, such as appellant can show here, can compel a government official to perform a purely ministerial duty. In other words, when the act sought involves no discretion, the government official cannot claim the immunity of the sovereign from suit. In the case of *Billings Utility Co. vs. Advisory Committee, 46 Fed. Sup. 691,* the Court stated:

> "Mandamus may lie where a public official wilfully and arbitrarily refuses to obey a duty imposed on him by statute."

This is precisely what the Court has before it here. We have a government official, who is commanded by the provisions of the U. S. Code, discussed above, to exercise control over the District Court building, to assign space, to collect rent, and to eject trespassers. Appellee has arbitrarily and capriciously refused to

exercise his authority over the Court House building, which is a ministerial duty and which appellant has every right to ask this Court, by way of mandamus, to compel appellee to perform. In *Thomas vs. Vinson, 80 U. S. App. D. C. 346,* we find:

> "Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command, it is regarded as being so far ministerial that its performance may be compelled by mandamus unless there be provision or implication to the contrary." Citing *Rahard vs. Manders, 66 Fed. Sup. 520. People ex rel Bunge vs. Downers Sanitary District, 281 Ill. App. 426. Jumonville vs. Herbert, 170 So. 497.*

In addition to what appellant has stated previously he would also like to point out to the Court that the wilful trespassers are also actively obstructing the efficient administration of justice. This is illustrated in the recent case of *U. S. vs. Fred S. Pritchett, Cr. No. 1167-49,* a case tried before Judge Goldsborough. At page 744 of the stenographic transcript of proceedings (January 24, 1950), there is recorded the following colloquy, which effectively shows the brazenness of the trespassers, Bar Association of the District of Columbia, despite the fact that they have no legal right to occupy space, rent-free, in the Court House building.

> "MR. LAUGHLIN:
>
> Your Honor, while I am proceeding with the argument, I have a number of other books that I would like to have, and I find that the library in this build-

ing does not have them. I am just wondering if I could get some assistance from someone in order to get these books?

THE COURT:

Well, I think so. I think one of the Deputy Marshals will be glad to do that for you. You may call for volunteers.

MR. LAUGHLIN:

Yes, sir. * * *"

And at page 752 we find the following:

"MR. LAUGHLIN:

Your Honor, the Marshal has just returned with my list, and the note from the librarian reads as follows: 'Not a member, and you cannot have them. Librarian.'

Now, of course, the librarian apparently knew this was a capital case, and obviously these are state reports I don't have in my library.

THE COURT:

I don't have them either, Mr. Laughlin.

MR. LAUGHLIN:

It seems to me the District Court—here is a library, a private corporation occupying space in a public building, rent-free. I think they have no right to be there. It may be the suit I will file tomorrow will test that out.

THE COURT:

The question is: I have ordered the books but I have no right to do it. I am not a member of the library myself. I have no control over it. The only thing I can do is to let you have the books I have myself.

MR. LAUGHLIN:

Most of these are State courts. I spent a lot of time last night in assembling these. I have ascertained there is another libarary for the use of the Municipal Court but I don't think they have these. They just have Federal cases.

Now, it is inconceivable to me that the Court allows the use of the space—of course, my suit won't come up for some time, and I cannot file it until tomorrow, but it seems to me the Court would have power in a capital case to do this where the Government—

THE COURT (interposing):

The only thing I can do, sir, is to request, to request the Marshal to go over there again and say that the Court makes the request that he send the books. I have no other right.

MR. ROBERTS:

I would order them myself for my use, but I am not a member of the Bar here—I am not a member of the Bar Association, that is, and I cannot ask that they be sent over.

THE COURT:

Has the Bar Association one?

MR. LAUGHLIN:

That is the point I make.

THE COURT:

I am talking about my power to do it, sir. I am only an honorary member of the Bar Association. You can let the Marshal go over again and tell the librarian it is requested by the Court, that the Court requests that they send the books. That is as far as I can go.

MR. LAUGHLIN:
Very well."

In short, the lower court committed reversible error in light of decisions of this Court, in refusing to allow appellant, a member of the public, a taxpayer, a member of the District bar who is denied access and use of public space in a public building, to bring mandamus against a government official who was commanded by controlling statutory law to perform a purely ministerial duty, namely, the exercise of his authority over the District Court building. Appellant does not pray this Court to have appellee exercise his authority in any particular way, for that would involve the issue of discretion. However appellant does contend that since appellee is laboring under the erroneous conclusion that he has no responsibility here by virtue of the provisions of the 1940 Edition of the District Code, appellant has every right to bring mandamus to compel appellee to exercise his authority over the District Court building and to eject trespassers who are occupying space in violation of all the statutes listed above, and who are brazen enough, despite the illegality of their position, to openly obstruct the efficient administration of justice within the District Court House.

CONCLUSION.

In view of the above we say that the judgment below was erroneous and should be reversed.

JAMES J. LAUGHLIN,
National Press Building,
Washington, D. C.,
Appellant.

CERTIFICATE.

This is to certify that copies of this brief have been served on opposing counsel on this the ..... day of May, 1951.

.....

APPENDIX.

COMPLAINT FOR MANDATORY INJUNCTION.

Filed Mar. 22, 1950, Harry M. Hull, Clerk.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

JAMES J. LAUGHLIN, National Press Building, Plaintiff,

versus

W. E. REYNOLDS, Commissioner of Public Buildings, Public Buildings Administration, General Services Administration, Washington, D. C.,

J. HOWARD McGRATH, Attorney General of the United States, Department of Justice, Washington, D. C., Defendants.

Civil Action No. 1338-50.

The complaint of James J. Laughlin shows unto the Court the following:

1. He is a citizen of the United States and a legal and voting resident of the State of Indiana; a member of the bar of this Court and the Supreme Court of the United States, and a practicing attorney in the District of Columbia.

2. The defendant, W. E. Reynolds, is the Commissioner of Public Buildings of the Public Buildings Administration.

3. The defendant, J. Howard McGrath, is the Attorney General of the United States.

4. Plaintiff says that in the building housing the United States District Court for the District of Columbia, at Indiana Avenue between 4th & 5th Streets, N. W., in the District of Columbia, there have been and there continues to be certain trespassers, that is to say, the Bar Association of the District of Columbia. This trespasser occupies considerable space in that building without authority of law, and the continued possession of the premises by this trespasser is interfering with the administration of justice in the District of Columbia and is hampering the work of the United States District Court for the District of Columbia.

5. Plaintiff says that Section 1, Title 40, of the United States Code, provides as follows:

> "The Public Buildings Administration in the Federal Works Agency shall have the absolute control of and the allotment of all space in the several public buildings owned or buildings leased by the United States in the District of Columbia, with the exception of the Executive Mansion and office of the President, Capitol Building, the Senate and House Office Buildings, the Capitol power plant, the buildings under the jurisdiction of the Regents of the Smithsonian Institution, and the Congressional Library Building,

and shall from time to time assign and allot, for the use of the several activities of the Government, all such space."

This legislation was enacted into law March 1, 1919, and the latest modification or amendment was July 1, 1939. Plaintiff says therefore that the control of the Court House building is under the jurisdiction of defendant No. 1.

6. Plaintiff says that on February 2, 1950 he addressed the following letter to defendant No. 1:

"February 2, 1950.

Mr. W. E. Reynolds,
Commissioner of Public Buildings Service,
General Services Building,
Public Buildings Service
Washington, D. C.

Dear Mr. Reynolds:

I desire to call your attention to a violation of the law existing in the District Court of the United States for the District of Columbia. This building as you know is located on Indiana Avenue between 4th and 5th Streets, N. W. On the top floor of this building a considerable portion of the building is set aside for the use and occupancy of the Bar Association of the District of Columbia.

This is a private corporation and of course they have no right to occupy space in a public building rent free.

I desire to call your attention to Title 40, Section 19, U. S. Code, 1946 Edition, reading as follows:

> 'The Federal Works Administrator shall have charge of the public buildings and grounds in the District of Columbia, under such regulations as may be prescribed by the President, except those buildings and grounds which are otherwise provided for by law; and when it shall be made to appear to the said Federal Works Administrator, or to the officer under his direction having immediate charge of said public buildings and grounds, that any person or persons is in unlawful occupation of any portion of said public lands in the District of Columbia, it shall be the duty of said officer in charge thereof to notify the marshal of the District of Columbia in writing of such unlawful occupation, and the said marshal shall thereupon cause the said trespasser or trespassers to be ejected from said lands, and shall restore possession of the same to the officer charged by law with the custody thereof.'

I thereupon call upon you to enforce the law and to make request on the United States Marshal for the District of Columbia to cause the trespassers, Bar Association of the District of Columbia, to be ejected from these premises. I can see it will take some little time for them to vacate these premises and in my judgment thirty days would be a reasonable time. In the event you do not take the action required by law within a period of 15 days from the date of this letter, or give a satisfactory explanation for your failure to take such action, I will file a complaint for mandatory injunction in the United States District Court for the District of Columbia. I trust such action will be unnecessary.

With assurances of kindest personal regards, I am
Sincerely yours,
(S.) JAMES J. LAUGHLIN,
(James J. Laughlin)."

Planitiff says that on February 21, 1950 he received the following letter from defendant No. 1:

"Feb. 21, 1950.

James J. Laughlin, Esq.,
National Press Building,
Washington, D. C.

Dear Mr. Laughlin:

This is in reply to your letter of February 2, 1950, addressed to the Commissioner of Public Buildings Service, with reference to certain matters concerning the building occupied by the District Court of the United States for the District of Columbia. In connection with the request contained in your letter, your attention is respectfully invited to the Civil Expenses Appropriation Act, approved March 3, 1875, 43rd Congress, 2nd Session, Chapter 130, 18 Stat., Part III, at Page 374 which Act provides in pertinent part:

> ' * * * for repairs and preservation of the courthouse building in the City of Washington, and for tiling the basement floors of the same, three thousand dollars: *provided that hereafter the building shall be under the supervision and control of the Attorney General.*' (Underscoring supplied.)

Since the building referred to in your letter is not at this time under the supervision and control of this

agency, it is believed that the matters with which your letter is concerned are more properly for the consideration of the agency under whose supervision and control the building in question falls.

Sincerely yours,
(S.) W. E. REYNOLDS,
Commissioner of Public
Buildings."

7. Plaintiff is of the view that defendant No. 1 is the proper party defendant in this case and has responsibility for the public buildings as set forth in this statute, with the exceptions recognized therein, and it is the duty of defendant No. 1 to force compliance with this statute. However, as a precautionary measure, plaintiff has included defendant No. 2.

8. Plaintiff says that the matter is a serious one inasmuch as the occupancy of the space in the Court House by the Bar Association does hamper the administration of justice in the District of Columbia. It is necessary that the United States District Court rent space in other buildings and scatter its functions throughout the District of Columbia. Plaintiff says further that due to the occupancy of this space by the Bar Association of the District of Columbia, a makeshift courtroom has to be provided for one of the judges, and it seems ironic that this makeshift courtroom, provided for one of the judges, is adjacent to the spacious quarters occupied by these trespassers. Plaintiff says further that the trespassers, overlooking the old maxim "Beggars can't be choosers", apparently feel secure in their status as squatters, when

they have refused to cooperate with the judges of this Court in the conduct of litigation. Plaintiff says that a noteworthy illustration will be found in the criminal case of *United States vs. Fred S. Pritchett, Cr. No. 1167-49*, a case tried before Judge Goldsborough.

On January 24, 1950, there appears at page 744 of the transcript in that case, the following:

> "MR. LAUGHLIN:
>
> Your Honor, while I am proceeding with the argument, I have a number of other books that I would like to have, and I find that the libarary in this building does not have them. I am just wondering if I could get some assistance from someone in order to get these books?
>
> THE COURT:
>
> Well, I think so. I think one of the Deputy Marshals will be glad to do that for you. You may call for volunteers.
>
> MR. LAUGHLIN:
>
> Yes, sir. * * *"

And at page 752 we find the following:

> "MR. LAUGHLIN:
>
> Your Honor, the Marshal has just returned with my list, and the note from the librarian reads as follows: 'Not a member, and you cannot have them. Librarian.'
>
> Now, of course, the librarian apparently knew this was a capital case, and obviously these are state reports I don't have in my library.

THE COURT:

I don't have them either, Mr. Laughlin.

MR. LAUGHLIN:

It seems to me the District Court—here is a library, a private corporation occupying space in a public building, rent-free. I think they have no right to be there. It may be the suit I will file tomorrow will test that out.

THE COURT:

The question is: I have ordered the books but I have no right to do it. I am not a member of the library myself. I have no control over it. The only thing I can do is to let you have the books I have myself.

MR. LAUGHLIN:

Most of these are State courts. I spent a lot of time last night in assembling these. I have ascertained there is another libarary for the use of the Municipal Court but I don't think they have these. They just have Federal cases.

Now, it is inconceivable to me that the Court allows the use of the space—of course, my suit won't come up for some time, and I cannot file it until tomorrow, but it seems to me the Court would have power in a capital case to do this where the Government—

THE COURT (interposing):

The only thing I can do, sir, is to request, to request the Marshal to go over there again and say that the Court makes the request that he send the books. I have no other right.

MR. ROBERTS:

I would order them myself for my use, but I am not a member of the Bar here—I am a member of the Bar Association, that is, and I cannot ask that they be sent over.

THE COURT:

Has the Bar Association one?

MR. LAUGHLIN:

That is the point I make.

THE COURT:

I am talking about my power to do it, sir. I am only an honorary member of the Bar Association. You can let the Marshal go over again and tell the librarian it is requested by the Court, that the Court requests that they send the books. That is as far as I can go.

MR. LAUGHLIN:

Very well."

The books requested were never furnished. Two or three, however, were sent over, but did not arrive until after the argument was completed.

9. Plaintiff says that the trespassers above referred to are in no wise a Government agency, nor are the trespassers a public or a charitable organization, and contrary to the general belief, they set up their own standards of procedure and are not controlled by the orders of this Court; further, they only admit to their membership as they see fit, and it does

not follow that a member of the bar of this Court in good standing is a member of said Association, or that they would be accepted by them. In truth and in fact these trespassers have for over half a century practiced a systematic course of racial discrimination and absolutely exclude colored from their rolls. The Court cannot be unaware of this situation, yet has never attempted to correct it. Plaintiff says that the Court should not give aid and comfort to exponents of racial discrimination.

WHEREFORE the premises considered, plaintiff prays:

1. That process issue from this Court directed to the defendants commanding them to answer this suit.

2. That order issue from this Court directing defendant No. 1 to comply with the requirements of Section 19, Title 40, U. S. Code, 1946 Edition, and evict the trespassers forthwith from the space they illegally possess, and after the order of eviction has been ordered and carried out, that the premises be restored to the United States District Court for the District of Columbia for court purposes.

3. And for such other and further relief as the circumstances of the case may require and to this Court may seem just and proper.

JAMES J. LAUGHLIN,
Plaintiff in Proper Person.

ORDER.

Filed Nov. 2, 1950, Harry M. Hull, Clerk.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

JAMES J. LAUGHLIN, Plaintiff,
versus
W. E. REYNOLDS, et al., Defendants.

Civil Action No. 1338-50.

This cause having come on to be heard by the court on plaintiff's motion for an order designating an "outside judge" to hear this cause, and upon defendant's motion to dismiss the complaint, it is this 10th day of October, 1950

ORDERED that plaintiff's motion for an order designating an "outside judge" to hear the cause be and the same hereby is denied, and it is further

ORDERED that defendant's motion to dismiss the complaint be and the same is hereby granted and the complaint dismissed with prejudice.

(S.) ALEXANDER HOLTZOFF,
Judge.

I hereby certify that a copy of the foregoing has been served on the plaintiff by mailing a copy thereof

to James J. Laughlin, Esq. pp., National Press Building, Washington, D. C., this 10th day of October, 1950.

(S.) L. CLARK EWING,
Assistant United States Attorney.

NOTICE OF APPEAL.

Filed Nov. 2, 1950, Harry M. Hull, Clerk.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

JAMES J. LAUGHLIN, Plaintiff,

versus

W. E. REYNOLDS, et al., Defendants.

Civil Action No. 1338-50.

Notice is hereby given this 2nd day of November, 1950 that the plaintiff hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from judgment of this Court entered October 10, 1950 in favor of defendants and against the plaintiff.

JAMES J. LAUGHLIN,
National Press Building,
Plaintiff in Proper Person.

Mail notice to:
L. Clark Ewing, Esq.
Asst. United States Attorney,
Court House,
Washington, D. C.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit

FILED SEP 21 1951

Joseph W. Stewart
CLERK

No. 10,851

JAMES J. LAUGHLIN, APPELLANT

v.

W. E. REYNOLDS, ET AL., APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

GEORGE MORRIS FAY,
United States Attorney.

JOSEPH M. HOWARD,
Assistant United States Attorney.

BRUCE G. SUNDLUN,
Attorney, Department of Justice.

No. 10,851

QUESTIONS PRESENTED

1. Does not appellant's complaint constitute an attempt to sue the United States without its consent?

2. Does appellant have standing in law as a proper party complainant to maintain the instant action for mandatory relief?

3. Does not appellant's complaint seek to compel the exercise of discretion and judgment by a public official in a particular manner?

4. Is it in the public interest, under the circumstances existing, to eject the Bar Association library from the District Court building?

5. Is the Bar Association library a trespasser on government property?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,851

JAMES J. LAUGHLIN, APPELLANT

v.

W. E. REYNOLDS, ET AL., APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant, a practicing attorney in the District of Columbia, sought a mandatory injunction in the United States District Court to force the Commissioner of Public Buildings Services, or the Attorney General, whichever officer had control of the assignment of space in the building housing the United States District Court for the District of Columbia, to compel them to eject the Bar Association of the District of Columbia from space in said building used for purposes of a library. Appellant in his complaint alleged that the Bar Association was a trespasser and that Section 19, Title 40, United States Code, (1946 Ed.), providing for the ejection of trespassers from government property, should be applied to the Bar Association (App. 21-30[a]).

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[a] References (App.) are to the Appendix to appellant's brief.

The District Court, acting upon the motion of the appellee herein, dismissed appellant's complaint (App. 31). Appellant thereupon brought this appeal from the District Court's order.

STATUTES INVOLVED

40 U.S.C. (1946 ed.) 1, 40 Stat. 1269 (see 1939 Reorg. Plan No. 1, 4 F.R. 2729, 53 Stat. 1426, 1427) provides:

> The Public Buildings Administration in the Federal Works Agency shall have the absolute control of and the allotment of all space in the several public buildings owned or buildings leased by the United States in the District of Columbia, with the exception of the Executive Mansion and office of the President, Capitol Building, the Senate and House Office Buildings, the Capitol power plant, the buildings under the jurisdiction of the Regents of the Smithsonian Institution, and the Congressional Library Building, and shall from time to time assign and allot, for the use of the several activities of the Government, all such space.

40 U.S.C. (1946 ed.) 19, R.S. § 1797, 32 Stat. 152 (see Reorg. Plan No. 1, 4 F.R. 2729, 53 Stat. 1426, 1427) provides:

> The Federal Works Administrator shall have charge of the public buildings and grounds in the District of Columbia, under such regulations as may be prescribed by the President, except those buildings and grounds which are otherwise provided for by law; and when it shall be made to appear to said Federal Works Administrator or other officer under his direction having immediate charge of said public buildings and grounds that any person or persons is in unlawful occupation of any portion of said public lands in the District of Columbia, it shall be the duty of said officer in charge thereof to notify the Marshal of the District of Columbia in writing of such unlawful occupation and the said Marshal shall thereupon cause the said trespasser or trespassers to be ejected from the said lands and shall restore possession of the same to the officer charged by law with the custody thereof.

D. C. Code (1940), § 45-822 provides:

> An estate at will is one held by the joint will of lessor and lessee, and which may be terminated at any time,

as herein elsewhere provided, by either party; and such estate shall not exist or be created except by express contract: *Provided, however,* That in case of a sale of real estate under mortgage or deed of trust or execution, and a conveyance thereof to the purchaser, the grantor in such mortgage or deed of trust, execution defendant, or those in possession claiming under him, shall be held and construed to be tenants at will, except in the case of a tenant holding under an unexpired lease for years, in writing, antedating the mortgage or deed of trust.

SUMMARY OF ARGUMENT

Appellee, in its brief, relies on the following arguments:

1. This case constitutes an attempt to sue the United States without its consent.

2. Appellant has no standing, and is not a proper party, to maintain an action for mandatory relief in that appellant has no personal, direct interest in the subject matter, nor is appellant in any immediate danger of sustaining some direct injury as a result of any action by appellee.

3. An action for mandatory relief will not lie to compel a discretionary act by a government official.

4. Mandatory relief will not be granted to enforce performance of abstract legal rights, the exercise of which is prejudicial to the public interest.

5. The statute relied on by appellant does not apply to the Bar Association of the District of Columbia in that the statute concerns itself with the ejection of trespassers from government real property, while said Association is in law either a tenant at will, or a licensee, on the government's property.

ARGUMENT

I

This Case Constitutes an Attempt to Sue the United States Without Its Consent

Appellant, in his complaint asks the court to direct the Commissioner of Public Buildings Service[1] to eject the

[1] Reorganization Plan No. 18 of 1950, 15 Fed. Reg. 3177, centralizes in the Administrator of General Services the administration of all Government buildings. Pursuant to that Reorganization

library of the Bar Association of the District of Columbia from the building housing the United States District Court for the District of Columbia, at Indiana Avenue between 4th and 5th Streets, N. W., in the District of Columbia.

The property here involved is admittedly owned by the United States. Unlike the usual case when difficult problems have arisen, appellant does not seek to secure title or assert any interest in the property. He is attempting, however, to control the management of such property and to prevent the government officer from permitting third persons to occupy it. This Court's recent analysis of the cases on this subject in *Seiden* v. *Larson,* 88 U.S. App. D.C. 188 F. 2d 661 (1951), certiorari denied June 4, 1951, is dispositive of the case at bar. ". . . In substance and in fact the ultimate relief which appellants seek could hardly be obtained without 'affirmative action by the sovereign or the disposition of unquestionably sovereign property' . . . [case cited] . . . Accordingly, this is a suit against the United States." See also *Osage Tribe* v. *Ickes,* 770 U.S. App. D.C. 114, 133 F. 2d 47 (1942), certiorari denied, 319 U.S. 750 (1943) affirming 45 F. Supp. 179; *Young* v. *Anderson,* 81 App. D.C. 379, 160 F. 2d 225 (1947), certiorari denied 331 U.S. 824 (1947).

II

Appellant Has No Standing to Sue

"If the suit is not against the United States, the nature of the plaintiff's interest becomes relevant; the courts must decide whether that interest is such as to entitle him to judicial protection against the conduct of which he complains, on the part of the individual defendant he has sued." *Seiden* v. *Larson, supra.* Appellant's complaint, while

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Plan, actual supervision and control of the District Court building was turned over to the General Services Administration on July 1, 1950. Therefore, while the Attorney General was the proper party defendant at the time defendants filed their motion to dismiss in the District Court in May, 1950, the reorganization plan has reversed the situation so that now the Attorney General is not a proper party defendant, and Mr. Reynolds, as Commissioner of Public Buildings Service, is a proper defendant.

labelled a Complaint for Mandatory Injunction, is in effect a petition for a writ of mandamus. Cf. *Warner Valley Stock Co.* v. *Smith,* 165 U.S. 28, 31 (1897); *Miguel* v. *McCarl,* 291 U.S. 442, 452 (1934). While the writ of mandamus has been abolished under the Federal Rules of Civil Procedure, the same relief is still available by appropriate motion. Rule 81(b), Federal Rules of Civil Procedure.

Appellant, however, has no standing before the court, and is not a proper party to maintain the action which he has filed. Though it may be supposed that appellant is a taxpayer, neither this status nor the fact that he is an attorney admitted to practice before the bar of the United States District Court for the District of Columbia are sufficient to qualify him as a proper party in a mandamus action. For nowhere in his complaint does appellant show that he has any personal or direct interest in the subject matter of this litigation. At best appellant is a public-spirited taxpayer doing his best to see that his concept of the law shall be enforced, and the Supreme Court of the United States has said in *Massachusetts* v. *Mellon,* 262 U.S. 447, that this status is insufficient:

> But the relation of a taxpayer of the United States to the Federal government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation of any payment out of the funds, so remote, fluctuating, and uncertain that no basis is afforded for an appeal to the preventive powers of a court . . .
>
> The party who invokes the power must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally.

The Court of Appeals for the District of Columbia has several times set forth its recognition of the rule that parties seeking relief by mandamus must have a direct and personal interest in the rights which they seek to secure. In *United States ex rel. Alsop Process Co.* v. *Wilson,* 33

App. D.C. 472, the relator invoked mandamus in an effort to have the Secretary of Agriculture ordered to revoke an order he had issued which prohibited bleaching flour by a certain process. The relator was the manufacturer of the machinery used in the prohibited process, and the effect of the Secretary's order was alleged to have seriously injured relator's business. The court denied the issuance of the writ of mandamus and said,

> In all the cases relied on by the relator mandamus was granted to secure to the relators rights which they are entitled personally to enjoy. Measuring by this test, it is apparent that the relator has no such interest in the subject matter of this controversy as to entitle it to the writ . . . *It is a mere volunteer in this proceeding, and as such, is without standing.* (Emphasis supplied)
>
> * * * * *
>
> The rule permitting private parties whose rights are directly jeopardized to maintain mandamus to compel a public duty is a salutary one, but it should not be enlarged to such an extent as to permit interference with the operations of the government by those whose rights are only remotely and indirectly affected.

The rule set forth in the case quoted above was restated in *United States ex rel. New York Warehouse Wharf and Terminal Ass'n, et al.* v. *Dern,* 63 App. D.C. 28, 68 F. 2d 773, where the court denied mandatory relief to a business competitor of a lessee of the government. The relator in that case sought to force the Secretary of War to terminate a lease, evict the lessee, and desist from commercial operations on the government-owned premises. The Court said that, "The first question that arises is whether appellants have a sufficient legal interest in the subject matter involved as to entitle them to maintain this proceeding." The court cited *United States ex rel. Alsop Process Co.* v. *Wilson, supra; United States ex rel. American Silver Producer's Ass'n* v. *Mellon,* 59 App. D.C. 24, 32 F. 2d 415, and *Massachusetts* v. *Mellon, supra,* as setting the standard by which the right of one to maintain an action for mandatory relief

was to be determined, and held that the relator's interest as a competitor of the government lessee was insufficient to enable him to maintain the action. The court said,

> Tested by the rule deducible from the authorities to which we have alluded appellants are without standing in this proceeding. Their interest is not personal and direct, but indirect and remote.

See also *Sheridan Wyoming Coal Co.* v. *Krug,* 168 F. 2d 557.

The interest of the appellant in the case at bar is even less than were the interests of the relators whose petitions for mandatory relief were denied in the cases just cited above. The relators there at least had pecuniary interests which were almost certain to be affected, if only remotely, by the actions taken, or not taken, by the government officials there concerned. It does not appear from the complaint filed by appellee herein that he has any pecuniary interest which will be affected in any way by a denial of the relief he seeks. Relief will not be granted to a relator until he shows that he has a clear legal right which is denied, and that the denial of the right affects his pecuniary interest. *People ex rel. Whitney* v. *Masonic Benevolent Association,* 98 Ill. 635.

Appellant has no standing to bring this action through his status as a taxpayer, nor does he have standing through his status as a public-spirited citizen seeking to enforce an alleged right of the public to use government-owned property, or inversely, to prevent specific private parties from having exclusive use of government property. This particular question was studied in *Wilson Line* v. *Selectmen of Hull,* 322 Mass. 296, 77 NE (2d) 222 (1948), on facts reasonably close to those in the case at bar. In that case, the town had bought a dock and leased part of it to an individual. A writ of mandamus was sought to compel cancellation of the lease and to force the town to allow others to use the dock, including the petitioner. The court said, in denying the writ:

> It is plain that the petition can be maintained only on the theory that some part of the wharves acquired by

> the town has become a common or public landing open to general use. The mere fact that the town has acquired Title to a parcel of real estate upon which there is a wharf does not give every individual a right to dock his vessel there any more than the acquisition of land upon which there is a driveway would give every individual a right to drive upon it. Towns hold their property for the public benefit, but it does not necessarily follow that every individual can use town property for his own benefit. This petition can be maintained only if the petitioners are seeking enforcement of a public right available to themselves and others . . . The petitioners are not vindicating any public right to use any of the wharves.

The issuance of a writ of mandamus is not a compulsory act for the courts but is, on the other hand, a discretionary act, the performance of which is generally guided by principles of equity. *United States* v. *Dern,* 289 U.S. 352. The party seeking mandatory relief must show that in addition to possession of an absolute legal right, and a direct personal interest, he comes into court with clean hands. *Turner* v. *Fisher,* 222 U.S. 204, 209. He must show that the relief he seeks, if granted, will not cause disturbance, confusion, and injury to others, and that he is not barred by laches. *Denver-Greeley Valley Immigration District* v. *McNeil,* 106 F. 2d 288. If the party seeking relief shows by his action that he is not sincere in seeking to secure a substantial individual right, the court will not grant mandatory relief, nor will the courts grant such relief to gratify vanity or curiosity. *North* v. *University of Illinois,* 137 Ill. 296, 27 NE 54, or settle "fancy questions," *People ex rel. Whitney* v. *Masonic Benevolent Association,* 98 Ill. 653.

Appellant in his brief sets forth part of the transcript of a local criminal case, *United States* v. *Fred S. Pritchett,* Cr. No. 1167-49, wherein appellant appeared as defendant's attorney. Appellant's Brief, p. 17. The same extract of that transcript is also a part of the original complaint filed in the case at bar. (App. p. 28) In the extract cited, there appears this quotation:

> Mr. Laughlin: It seems to me the District Court—here is a library, a private corporation occupying space

> in a public building rent-free. I think they have no right to be there. It may be the suit I will file tomorrow will test that out.

The extract of the transcript as a whole is immaterial to this cause, but the fact that the extract was used in both appellant's complaint and brief is material to a determination of appellant's intent in bringing the case now at bar. It is clear, at least, that appellant's actions at the time of the *Prichett* case were for purposes of this suit, and that this suit relies on appellant's actions at that time. It can be inferred that appellant seeks in the case at bar to test the abstract right of the Public Buildings Services Commissioner to permit the Bar Association of the District of Columbia library to occupy space in the court building, and not to enforce a legal right in which appellant has a substantial personal and direct interest. Appellant's actions place him within the decision in *North* v. *University of Illinois, supra,* where the court denied the petition for a writ of mandamus to force the trustees of the University to revoke a rule requiring all students to attend chapel religious services. The petition was brought by a student who had been suspended five years previous by the University for refusing to attend the services. The court said:

> First, does he show by his petition that his purpose in so doing is to vindicate a personal right or protect an individual interest? He states no facts in his petition from which it can be seen that he will be injured in any way if the writ is denied. He simply shows that after nearly five years of acquiescence in the action of the faculty and board of trustees suspending him, he "applied for admission to classes . . . and was refused . . . what his purpose was in making application, —whether to pursue his course of studies therein, or merely for the purpose of this suit he does not say." . . . *it is clear that the application was made, not for the purpose of securing an individual right, but for the sole purpose of questioning the right of the board of trustees to adopt the rule, which he condemns* . . . (Emphasis supplied.)

Separate opinion by Scholfield, C.J.:

> I place my concurrence in the refusal to award a peremptory mandamus in this case on this ground only: a peremptory mandamus will never issue in favor of a private party, unless it shall be made to affirmatively appear that he will otherwise be deprived of something of substantial value to him. It will never be granted, however clear may be the abstract right, to settle a question to merely gratify vanity or curiosity. . . .

On the authorities set forth above it is submitted that appellant has no standing in law which would enable him to maintain his suit for mandatory relief. He has no standing merely through his status as a taxpayer and citizen, and he has shown no direct and personal interest in the securing of the relief claimed sufficient to, in the face of the authorities, qualify appellant as a proper party plaintiff in a suit for mandatory relief. Appellant, in addition, has shown by his actions that his purpose in filing his complaint was to test out an alleged abstract question of law, and not to seek the enforcement of a substantial legal right which, if not enforced, would result in direct and personal injury to appellant. Appellant by this conduct has affirmatively established that he has no standing in law which would enable him to maintain his complaint.

III

An Action for Mandatory Injunction Will Not Lie to Compel Discretionary Action of Government Officials

Appellant's complaint was properly dismissed by the District Court because it sought, by mandamus, to compel the discretionary act of a public official. In addition, it sought to compel the exercise of that official's discretion in a particular manner. It is elementary that mandamus will not lie to achieve such results. *United States* v. *Wilbur,* 283 U.S. 414; *Wilbur* v. *United States,* 281 U.S. 206, 218; *United States ex rel. Roughton* v. *Ickes,* 69 App. D.C. 324, 328-329, 101 F. 2d 248; *Higginson* v. *Schoeneman,* C.A.D.C., 190 F. 2d 32 (August 20, 1951).

Appellant in his complaint relies on Section 19, Title 40, United States Code, (1946 ed.), as statutory authority for the relief requested in said complaint. This statute provides that the Federal Works Administrator [2] has authority to notify the Marshal of the District of Columbia to eject trespassers from public lands and buildings under the Administrator's control. At one time the authority now vested in the Commissioner of Public Buildings Service was vested in the Chief of Engineers, 32 Stat. 152. At that time the Secretary of War applied to the Attorney General for an opinion as to whether the Chief of Engineers might use the statute to summarily eject some alleged trespassers then located on public lands near the west end of Virginia Avenue in the District of Columbia. The Attorney General in his opinion advised the Secretary of War not to use the statute as a basis for ejection, but to instead apply to the courts for a ruling on the status of the alleged trespassers. 25 Op. Atty. Gen. 18, 20. The opinion said:

> The whole question resolves itself into one of expediency in each particular case, rather than of law; and the question in any case will be whether, under all the circumstances, it is expedient to resort to those proceedings or proceed in the usual way in the courts. *The determination of this question in each instance is committed to your administrative judgment* and does not properly fall within my function to render opinions on questions of law. (Emphasis supplied.)

If the question of whether or not the statute should be invoked against alleged trespassers is a matter for "administrative judgment" in "each instance" it is patently clear that there is involved the exercise of discretion by the administrative officer concerned. Mandamus is, thus, not available. Where the duty imposed on the public officer is such as necessarily requires the examination of evidence and the decision of questions of law and fact, such duty is

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[2] Under the Authority of Section 103(a) of the Act of June 30, 1949, Ch. 288, Title 1, 63 Stat. 380, all functions of the Federal Works Administrator were transferred to the Administrator of General Services.

not ministerial. *Klevesahl* v. *Byington,* 1 Cal. App. (2d) 671, 37 P. (2d) 179, 182; *Mangieracina* v. *Haney,* 141 S.W. (2d) 89.

The Attorney General has also held that Executive officers of the Government may grant revocable licenses to private parties for the use of government real property, providing the government derives some benefit from the granting of such a license. 22 Op. Atty. Gen. 240, 245; 30 Op. Atty. Gen. 470, 482; 34 Op. Atty. Gen. 320, 322-23.[3] In acknowledging this power of license possessed by Executive officers of the government, however, the Attorney General stated in 30 Op. Atty. Gen. 470, 482, that it is a question for the exercise of judgment by the officer concerned as to whether any benefit from the license will be derived to the government:

> Whether, as in this case, the determinable occupancy of the land in question is or is not a benefit to the government in respect to that land, or in respect to other property or interests under your control *is a question for the exercise of the judgment of the official vested with the power* rather than a question of law to be determined in advance by the law officers of the government. (Emphasis supplied.)

The status of the Bar Association library in the District Court Building is at least that of a licensee, it is clearly not a trespasser, and at common law it probably would be considered a tenant at will. Whatever may be its status, however, whether it be licensee or tenant at will, there must be an exercise of judgment by the Executive officer concerned on the question of whether or not there was any benefit to be derived to the government from the occupancy by the library. This determination of benefit to the government is a prerequisite to the granting of permission for occupancy. Once the library is in occupation, and a complaint such as appellant's is filed, there must be a further exercise of judgment to determine whether the library comes within the terms of the ejection statute. Either of these exercises

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[3] See part IV, of this brief for full discussion.

of discretion and judgment are sufficient to take appellant's alleged cause out of the scope of a mandamus action.

Appellant's position in the case at bar would require the court to direct the Commissioner of Public Buildings Services to blindly move under the statute against the Bar Association library merely because appellant has filed a complaint requesting that such action be taken. Appellant's position would deny to the Commissioner the right to even investigate to determine if appellant's complaint was well founded, and *a fortiori,* would deny to the Commissioner the right to come to a conclusion that appellant was wrong in his position. To admit the validity of such a position would be to sanction government by mandamus at the low cost of court filing charges. Such a position is ridiculous to consider.

The Commissioner of Public Buildings Services has indicated through his defense of this suit that he is aware of the fact that the Bar Association library occupies space in the United States District Court Building and that he authorizes and approves such occupancy. Appellant by prosecution of his complaint, therefore, not only seeks to enforce the exercise of discretion by mandamus, but further, seeks to enforce the exercise of such discretion in a particular way. In effect, he seeks to force the Commissioner to reverse the decision he has already made to permit the Bar Association to maintain its library in the court building. The Supreme Court in *Wilbur* v. *United States,* 281 U.S. 206, 218 said mandamus was not available for this purpose:

> Mandamus is employed to compel the performance when refused, of a ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, *but not to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of action already taken in the exercise of either.* (Emphasis supplied.)

The question of whether Section 19, Title 40, U.S. Code (1946 Ed.) should be used against the Bar Association library involves the exercise of judgment and discretion by

the Commissioner of Public Buildings Services. He must determine whether the Bar Association is "in unlawful occupation" of the premises, and this involves the question in law of whether or not the Bar Association is a trespasser[4] on government property. Determination of this question alone requires the exercise of judgment and discretion sufficient to take the decision out of the reach of mandamus. *Berlinsky* v. *Woods,* 178 F. 2d 265. Deciding this question is obviously no ministerial function because the existence of this cause alone, and its defense by the Commissioner of Public Buildings Services, is sufficient evidence to establish that different parties can come to different conclusions, given the same facts. As long as different parties can, in good faith, come to contrary conclusions as to the duty of the Commissioner under the statute, his obligation to act is not "peremptory and plainly defined," and mandamus will not lie. *United States* v. *Wilbur,* 283 U.S. 414.

IV

Mandamus Will Not Lie to Enforce a Legal Right If the Result Will Operate Against the Public Interest

Appellee in his brief has established that appellant has no standing as a proper party in law to institute his suit for mandatory relief, and further that the relief which appellant seeks in his complaint is not properly the subject for a mandamus suit in that the complaint seeks to enforce the exercise of discretion by a public officer. But even if these objections to appellant's suit did not exist, the court should not grant appellant the relief he seeks, because to do so would not be in the public interest. The Supreme Court said in *Duncan Townsite Co.* v. *Lane,* 245 U.S. 308:

> The writ of mandamus is not always demandable as an absolute right and whether it shall be granted or not frequently rests with the discretion of the court. The writ will be granted to prevent a failure of justice, but

[4] The Bar Association library in the District Court building is not a trespasser on government property, but is instead a tenant at will, or licensee thereon. This point is developed fully on page 17 of this brief.

> never to promote manifest injustice. It is a remedial process and may be issued to remedy a wrong, not to promote one, to compel the discharge of a duty which ought to be performed, but not to compel the performance of an act which will work a public or private mischief, or to compel a compliance with the strict letter of the law in disregard of its spirit.

See also: *People ex rel. Wood* v. *Assessors, etc.,* 137 N.Y. 201, 33 N.E. 353; *Effingham* v. *Hamilton,* 68 Miss. 523, 10 So. 39.

Eviction of the Bar Association library, if it is assumed for a minute that the organization could be considered a trespasser, might be in compliance with the language of Section 19, Title 40, United States Code, (1946 ed.), but the same would work a large inconvenience on the practicing bar of the District of Columbia and on the court itself. It is well known that the library is the only source of state reports in the vicinity of Judiciary Square. Removal of the Bar Association library would leave a void for there is no government sponsored library, open to members of the bar, in the same area. Replacement of the Bar Association library by a government maintained library would require an expenditure which the government is at present relieved of through the tenancy of the Bar Association library.

No practical results would be achieved by the ejection of the Bar Association library. The consequences of such a court-directed action would only create confusion and disorder. Nobody would benefit by the move, not even the government.[5] The government, in fact, would probably be put to additional expenses as a result thereof. In *United States* v. *Dern,* 289 U.S. 352, the petitioner for a writ of mandamus had a legal right to build a wharf on land already condemned for the construction of a parkway. Petitioner,

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[5] When the new court building on Constitution Avenue is completed in the near future the subject of this suit will be moot, as the allotment of space in the new building is a function reserved to the Chief Judge of the United States Court of Appeals for the District of Columbia and the Chief Judge of the United States District Court for the District of Columbia. Section 130, Title 40, Supp. to U. S. Code annotated, 1951 Ed.

therefore, brought mandamus to force the Secretary of War, the appropriate officer, to authorize such construction. The court denied the writ, saying,

> Although the remedy by mandamus is at law its allowance is controlled by equitable principles . . . [cases cited] . . . and it may be refused for reasons comparable to those which would lead a court of equity, in the exercise of sound discretion, to withhold its protection of an undoubted legal right. . . . The apparent consequence of authorizing the construction of the wharf would be only to increase the expense to the government of constructing the parkway by so much of the cost of the wharf and of the other proposed improvements as may be included in the just compensation to be awarded for their taking. . . .
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> The court in its discretion, may refuse mandamus to compel the doing of an idle act . . . [cases cited] . . . or to give a remedy which would work a public injury or embarrassment . . . [cases cited] . . . just as in its sound discretion a court of equity may refuse to enforce or protect legal rights the exercise of which may be prejudicial to the public interest . . . [cases cited] . . .

As it would be against the public interest to permit erection of a wharf which would subsequently have to be torn down, so it would be against the interest of the public to eject a library which could only be replaced at public expense. In short, as the court said in *People* v. *Olsen,* 215 Ill. 620, 74 NE. 785:

> The writ of mandamus not being a writ of right, it is largely within the sound discretion of the court to refuse to issue it. When a writ of mandamus is asked the court may inquire whether it will operate impartially, and whether it will or will not promote substantial justice.

The answers to these inquiries by the court in the case at bar are surely all in the negative, and the court is thereby correct in refusing to issue the mandatory injunction which was sought. It was said in *People* v. *Olsen, supra,* that the courts may,

> . . . in view of the consequences attendant on the issuing of a writ of mandamus, refuse the writ, though the petitioner has a clear legal right for which mandamus is a proper remedy . . . [cases cited] . . . The court may act on existing facts and view the case with reference to the consequences of its action.

The appellant has no standing to bring his action, his action is not available to secure the relief he seeks, but if both his standing and his action for mandatory relief were technically established, the court in the exercise of its discretion should refuse to issue the mandatory injunction sought by the complaint, on the ground that the consequences attendant on ejecting the Bar Association library from the District Court Building would be contrary to the public interest.

V

The Statute Relied on by Appellant Does Not Apply to the Bar Association Library

Appellant in substance bases his complaint on the theory that the Bar Association of the District of Columbia is a "wilful trespasser" in the building on Indiana Avenue in Washington, D. C., occupied by the United States District Court for the District of Columbia. The appellant must assert that the Bar Association is a trespasser because the statute relied on by appellant in his effort to eject the Bar Association from the court building applies only to trespassers. Section 19, Title 40, U.S. Code (1946 Ed.). If the Bar Association is not a trespasser, appellant cannot, under any circumstances, have a cause of action. In fact, the Association is not a trespasser, but is instead, either a revocable licensee of the Government, or a tenant at will.

The distinction between a trespasser and a tenant is an obvious one, the former being one who enters another's land without either permission or authority in law, and a tenant being one who enters or retains possession by permission. Tiffany, *Landlord and Tenant,* 1910 Ed., § 6, p. 19. A tenancy at will may exist merely as a result of the taking of possession of land by permission, "permissive

possession," as it may be called, without any understanding as to the duration of the possession. Ordinarily a tenancy at will is created by the owner of premises merely giving permission to another to take possession, and the latter taking possession accordingly. "But the words, 'you may take possession of this property,' are quite as effective as the words, 'I, A.B., hereby lease to you, C.D., the premises (describing them) to have and to hold at will.'" *Tiffany, supra,* § 17, p. 165. In either case there is a lease, either oral or in writing as the case may be. The only distinction between the forms of expression is that in the former case there is no statement as to the nature of the tenancy, and this has to be supplied by the law, which determines that the taking of possession under such bare permission creates a tenancy at will. "One who enters another's land without permission is a trespasser and not a tenant . . ." *Tiffany, supra,* § 17, p. 167.

The law will imply the permission of the landlord, and it does not have to be proved as a question of fact. In *Hancock* v. *Maurer,* 103 Okl. 196, 229 P. 611, the court said:

> If the landlord has knowledge of the occupancy, permissive acts on the part of the landlord giving evidence of consent for continued possession may be deemed sufficient to create the tenancy . . . A tenancy at will may be created by mere permissive occupancy as where the owner of land permits another to occupy it and take care of it without any lease or agreement to pay rent.

The fact that the tenancy continues for long periods of time does not change its nature. The court in *Johnson* v. *Johnson,* 13 R.I. 467, held:

> If a tenant, says Chancellor Kent in his Commentaries, "be placed on land without any terms prescribed and as a mere occupier, he is strictly a tenant at will . . . Nor will mere lapse of time turn a tenancy at will into a tenancy from year to year . . . In *Doe on dem. Groves* v. *Groves,* (the occupancy continued) for nearly fifty years, and yet the occupants were held to be tenants at will."

It is not necessary to show any agreement to pay rent to prove the conventional relationship of landlord and tenant, *President, etc. of Manhattan Co.* v. *Wieberg,* 289 N.Y.S. 539, 164 Misc. 618. Nor is the payment of rent necessary to the creation of a tenancy at will. *Carruth* v. *Carruth,* 48 S.E. 2d 387; *Williams* v. *Saratoga County Agricultural Society,* 103 N.Y.S. 2d 363 (March 7, 1951), *Jones* v. *Shay,* 50 Cal. 508. A leading case is *Larned* v. *Hudson,* 60 N.Y. 102:

> When one enters upon land by permission of the owner for an indefinite period, even without the reservation of rent, he is by implication of law a tenant at will . . . If he be placed upon the land as a mere occupier, without any terms prescribed or rent reserved, he is strictly a tenant at will.

Supporting text authority is quoted in *Kirsch* v. *Wolfson,* 234 S. W. 2d 966, where the court said:

> In 3 Thompson on Real Property, Section 1020, it is said: "One who enters upon land by permission of the owner for an indefinite period, even without reservation of rent, is by implication of law a tenant at will . . .

See also *791 Corporation* v. *Engel,* 273 N.Y.S. 322, 153 Misc. 107.

Under the above authorities, the Bar Association library on government property is a tenant at will and not a trespasser. If the Bar Association is not a trespasser, then Section 19, Title 40, United States Code (1946 Ed.), relied on by appellant is not applicable, for that statute applies only to trespassers. Appellant's complaint is then proper subject for a motion to dismiss on the ground that it does not state a cause of action.

If Section 822, Title 45, D. C. Code of 1940 [6] operates to

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[6] § 45-822, D. C. Code of 1940 provides:

An estate at will is one held by the suit will of the lessor and lessee, and which may be terminated at any time, as herein elsewhere provided, by either party; and such estate shall not exist or be created except by express contract. *Provided, however,* that in case of a sale of real estate under mortgage of deed of trust or execution, and a conveyance thereof to the purchases, the grantor in such mortgage or deed of trust, execution defendant, or those in possession claiming under him,

prohibit the Bar Association from attaining the estate of a tenant at will, then under the rulings of the Attorney General the Association has at least the status of a licensee. The Attorney General has ruled several times that Executive officers of the government have the power to grant revocable licenses to private parties for the use of government real property. In an opinion to the Secretary of War, set forth at 20 Op. Atty. Gen. 240, 245, it is stated that:

> The right of an Executive Department of the government to grant permission for the use of any part of the government lands, except for government purposes, has been several times considered by the Attorney General . . . [opinions cited] . . . In no instance that I know of has any department assumed to grant anything more than a mere revocable license, subject to termination at the will of the government . . . A license was granted to a railroad company to use a part of the government land at Sandy Hook for railroad tracks . . . A part of the land belonging to Fortress Monroe Reservation, at Old Point Comfort, was allowed to be used as a site for a hotel. In the same way the Secretary of War has granted licenses to construct and maintain an irrigation ditch through the military reservation at Fort Selden, N. Mex., the licensee furnishing free to the United States all the water required for military purposes.
>
> Long-continued exercise of a power of this kind by the Secretary of War, and the open and notorious use of government reservations by such licensees without legislative objection from Congress and without the adoption of any legislative rule upon the subject, implies the tacit consent of Congress to this custom. At the same time, I deem it proper to call your attention to the fact that this custom cannot be maintained upon any ground except benefit to the public interests either directly or indirectly. Cf. 30 Op. Atty. Gen. 470, 34 Op. Atty. Gen. 320.

If the Bar Association occupies the status of a licensee on government property, Section 19, Title 40, United States

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shall be held and construed to be tenants at will, except in the case of a tenant holding under an unexpired lease for years, in writing, ante dating the mortgage or deed of trust.

Code (1946 Ed.), still does not apply and appellant's complaint still is subject to dismissal for failure to state a cause of action. Statutes imposing penalties must be construed strictly, and in favor of the person against whom the penalty is to be directed. The ejection statute refers to persons who are trespassers, and it will not apply to an occupant who is in possession through permission, express or implied, or by license. A license, though not an estate in reality is clearly superior to a trespass in that one is lawful and the other is unlawful.

CONCLUSION

"In cases of this sort, where plaintiff challenges action by an administrative official relative to government property, two questions are commonly posed at the outset. (1) Does the plaintiff have standing to sue, and (2) is the suit actually one against the United States, to which it has not consented? These questions are of necessity closely related and in fact they sometimes blend together." *Seiden* v. *Larson, supra.* Regardless of whether the two questions posed by this Court in the case above-cited are considered separately, or as being inter-related, plaintiff's action must fail, and the decision of the District Court dismissing appellant's complaint must be affirmed. First, appellant's suit is one brought against the United States without its consent. Second, aside from whether appellant's action is a suit against the United States, appellant has no standing to bring his action in that he is a mere volunteer without any direct or personal interest in the enforcement of the relief requested. Third, the relief sought by appellant in his complaint is unavailable through mandamus or mandatory injunction in that it requires the exercise of discretion and judgment by a public official. Fourth, assuming that appellant could overcome the three previously stated barriers to his complaint, the District Court still properly dismissed the complaint in that the relief requested therein would operate, if granted, contrary to the public interest. Lastly, appellant's complaint fails to state a cause of action insofar as it relies on a statute concerning trespassers and persons in unlawful occupancy

whereas the Bar Association of the District of Columbia library in the building housing the United States District Court for the District of Columbia, on Indiana Avenue, in Washington, D. C., occupies either the estate of a tenant at will, or the status of a licensee, and is in no event, a trespasser.

WHEREFORE, the appellee respectfully requests the court to affirm the judgment of the District Court in dismissing the complaint filed herein.

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